

## Which Justice? Which Rationality? Montesquieu's theory of right in the *Spirit of the Laws*<sup>1</sup>

Let man, returning to himself, consider what he is in comparison with what exists; [...] and from this little dungeon, in which he finds himself lodged, I mean the universe, let him learn to take the earth, its realms, its cities, its houses and himself at their proper value.<sup>2</sup>

In Book One of *The Spirit of the Laws*, the preliminary definition of laws as 'necessary relations deriving from the nature of things' seems to eliminate any normative intent. The critics were forthright, whether attacking a latent Spinozism<sup>3</sup> or a false separation of law from commandment (Destutt de Tracy<sup>4</sup>), or simply rejecting a conception of justice which 'supposes all right to be founded on certain *rappports* or relations' (Hume<sup>5</sup>).

In this paper, I would like to reassess a classic question. Did Montesquieu, as Condorcet claimed, give an account of laws without measuring their justice?<sup>6</sup> Was legal and institutional history substituted for a perspective of foundations or legitimacy – in

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<sup>1</sup> First published in French in C. Volpilhac-Auger, ed., *Montesquieu en 2005*, Oxford: Voltaire Foundation, 2005, pp. 219-42. Translated by Patrick Camillier.

<sup>2</sup> Pascal, *Pensées*, translated by A. J. Krailsheimer, rev.edn., London: Penguin, 1995, p. 60 (No. 72).

<sup>3</sup> This was the case with the Jansenist journal *Les Nouvelles Ecclésiastiques*, which Montesquieu answered in his 'Defence' of *The Spirit of the Laws* (first objection); see Thomas Nugent's preface, 'The Translator to the Reader', in the original English edition of 1752 (reprinted London: G. Bell & Sons, 1914).

<sup>4</sup> In his *Commentary and Review of Montesquieu's Spirit of the Laws* (reprint: Clark, NJ: The Lawbook Exchange, 2006, p. 5), Destutt de Tracy indignantly points to the univocality of the law: 'a law is not a relation, nor is a relation a law'; 'law means a rule of action, prescribed by an authority invested with competent power and a right to do so.' See B. Binoche, 'Comment suivre la nature? Tracy, lecteur de Montesquieu', *Revue Montesquieu* 5, 2001, pp. 59-91.

<sup>5</sup> Hume, *An Inquiry Concerning the Principles of Morals*, New York: Cosimo Classics, 2006, p. 30. These '*rappports*', as Hume saw, may be understood equally as moral relations and empirical regularities; Montesquieu's definition of laws as 'relations' does not rest upon a prior distinction between Is and Ought, and it is for this reason that Hume criticizes it in the words quoted above (although he rightly traces the 'relational' theory back to Malebranche).

<sup>6</sup> 'Why has he not laid down some principles which would enable us to discriminate among the laws flowing from a legitimate power, those which are unjust, and those which are conformable to justice?' Condorcet, 'Observations on the Twenty-Ninth Book of The Spirit of Law', in Destutt de Tracy, *Commentary and Review*, op. cit., p. 263.

short, for *principles* of political right (Rousseau)?<sup>7</sup> Sociologists who place Montesquieu among the founders of their discipline seem to confirm this reading, since what they praise is his demotion of the idealist problematic of justice in favour of the comparative study of actual systems of laws.<sup>8</sup>

However, a quite different interpretation is possible in which Montesquieu didn't reduce right to fact. Rather, he restored to the human species its inherent rights. According to Voltaire, *The Spirit of the Laws* is the 'code of reason and liberty' that invokes 'the respective rights of men over each other'.<sup>9</sup>

Finally, Hegel proposed a third way: while acknowledging that the historicist conception – which the Scottish and German historical schools took over from Montesquieu – was right to investigate the emergence of institutions from the mores or social ethic of a people, he insisted that, in the abstraction of social contract theory, the genesis of right did not and could not conceptually define what is just.<sup>10</sup>

It therefore seems legitimate to ask whether Montesquieu abandoned the very idea of justice in favour of the *justification* of institutions. Did he substitute the rationalization of law for a theory of justice? In this paper, my aim will be to demonstrate that *The Spirit of the Laws* does not preclude a conceptual definition of justice beyond the internal rationality of law itself, or an external rationality linked to particular historical circumstances and the physical or moral causes that constitute the 'spirit' of a people. Although Montesquieu neglects the issue of political obligation associated with sovereignty theory, turning away from the 'theological paradigm' of justice and embracing the autonomy of politics from all metaphysics, he does not for all that abandon the idea of an objective foundation of right. I should therefore like to test the hypothesis that the relations of equity which Montesquieu (in contrast to legal positivism) considered possible are relations of *proportionality* that the legislator has to respect if he is to promote government *moderation* and the preservation of his state. Justice, liberty and power will here appear united in a certain figure of rationality – the figure of enlightened utility.

This study will bring out Montesquieu's special position in modern thought. Without reverting to a transcendental notion of justice, *The Spirit of the Laws* roots the validity of legal values in the objectivity of the relations inherent in 'the nature of things'. Neither classical nor modern in the sense that Leo Strauss (or either his disciples or critics) gives to these terms, Montesquieu eludes interpretative oppositions: his theory of rights challenges the contrast between a relative justice based on measure (proportionate equality) and the absolute justice of human rights;<sup>11</sup> it challenges the opposition between a classical concept of right based on the nature of things and modern conceptions based

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<sup>7</sup> 'The science of political right is yet to be born.... The only modern in a position to create this great and useless science was the illustrious Montesquieu. But he was careful not to discuss the principles of political right. He was content to discuss the positive right of established governments, and nothing in the world is more different than these two studies.' *Emile, or On Education*, London: Penguin, 1991, p. 458.

<sup>8</sup> Apart from the positions of Comte, Durkheim and Aron, mention should be made of the less well-known work of E. Ehrlich ('Montesquieu and Sociological Jurisprudence', *Harvard Law Review*, XXIX, 1916), G. Gurvitch ('La sociologie juridique de Montesquieu', *Revue de Métaphysique et de Morale*, XLVI, 1939, pp. 611-26) and D. Kelley ('The Prehistory of Sociology. Montesquieu, Vico, and the Legal Tradition', in *History, Law and the Human Sciences*, London: Variorum Reprints, 1984, pp. 133-44).

<sup>9</sup> Montesquieu, *The Spirit of the Laws* (henceforth SL), Cambridge: Cambridge University Press, 1989; here Book XXV:13, p. 491. On the 'code of reason and liberty', see Voltaire, *Commentaire sur L'Esprit des lois* (1777), in: *Montesquieu. Mémoire de la critique*, ed. by C. Volpilhac-Augier, Paris, Presses de l'Université de Paris-Sorbonne, 2003, avant-propos, p. 499.

<sup>10</sup> Hegel, *Philosophy of Right*, Oxford: Oxford University Press, 1952, §3, pp. 16f.

<sup>11</sup> See Henri Bergson, *The Two Sources of Morality and Religion*, New York: Henry Holt, 1935, pp. 60f.

on subjective rights.<sup>12</sup> It is no longer a question here of counterposing theories of human and natural justice, classical natural law and modern human rights. Although the idea of natural justice disappears in the *Spirit of the laws*, subjectivity does not become the a-historical foundation of legal values. Justice and rationality merge in the concept of ‘necessary relations’ from which laws are supposed to derive: the moderate legislator is one who respects these relations; the despotic politician breaks them in arbitrary fashion. The classical theory of justice as proportionate equality is thus reinterpreted in light of the modern definition of liberty as the protection of rights against arbitrariness and the abuse of power.

## 1. From the Possible to the Real: Relations of Equity as Relations of Proportion

It is beyond the scope of this paper to re-examine the status of natural law in *The Spirit of the Laws*.<sup>13</sup> Prior to any social convention, justice is defined as a relation between *things* – ‘a relation of suitability, which actually exists between two things’.<sup>14</sup> Against Hobbes,<sup>15</sup> Montesquieu takes his inspiration from Leibniz,<sup>16</sup> Malebranche<sup>17</sup> and Adam Clarke.<sup>18</sup> To refute legal positivism is to affirm the existence of justice prior to laws: ‘Before laws were made, there were possible relations of justice. To say that there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle was drawn, all its radii were not equal.’<sup>19</sup> Some interpreters have expressed surprise at this reintroduction of natural law theory, seeing it either as a ‘metaphysical residue’ incompatible with the rest of the work,<sup>20</sup> or as a public act of allegiance to the ‘most insipid of traditions’ at a time

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<sup>12</sup> On this opposition, see Michel Villey, *La formation de la pensée juridique moderne*, Paris: P.U.F., 2003 ; René Sève, *Leibniz et l'école moderne du droit naturel*, Paris: P.U.F., 1989.

<sup>13</sup> SL, I:1. For a survey of the vast bibliography relating to Book One of *The Spirit of the Laws* and Montesquieu's relationship to natural law theory, see J.-P. Courtois, *Inflexions de la rationalité dans L'Esprit des lois*, Paris: P.U.F., 1999. Among those who see a continuity between Montesquieu and modern natural law theory, see especially M. Waddicor, *Montesquieu and the Philosophy of Natural Law*, The Hague: Martinus Nijhoff, 1970.

<sup>14</sup> Montesquieu, *Persian Letters* (henceforth PL), London: Penguin, 1973, No. 83, p. 162.

<sup>15</sup> See Montesquieu, *Pensées*, Paris: Laffont, 1991, Nos. 1266 and 224.

<sup>16</sup> Leibniz defined God's punitive justice as the ‘principle of the fitness of things’, according to which evil acts must be sanctioned (*Theodicy*, La Salle, Ill.: Open Court, 1985, § 73-74, pp. 161-63). Montesquieu had a copy of the book in his possession: see L. Desgraves and C. Volpilhac-Auger, eds., *Catalogue de la bibliothèque de Montesquieu à La Brède*, Naples: Liguori, 1999, Nos. 405 and 410.

<sup>17</sup> As Patrick Riley has shown, in Malebranche's *Reflections on Physical Premotion* (a copy of which Leibniz had in his library) moral relations are analogous to mathematical relations. Against Hobbes, relations of perfection are not only truths but laws (P. Riley, *The General Will Before Rousseau*, Princeton: Princeton University Press, 1986, p. 171).

<sup>18</sup> In his *Discourse concerning the Being and Attributes of God* (1728), Samuel Clarke already spoke of ‘the nature of things’, concerning relations between things that do not depend upon any actual state of affairs (I:3 and I:12). He put forward a joint refutation of Hobbes and Spinoza, describing the latter as ‘the most celebrated patron of atheism in our time’ (I:3). Montesquieu mentions in *Spicilege* (No. 561) that he had purchased a copy of Clarke's lectures in England.

<sup>19</sup> SL, I:4. See also Montesquieu's answer to the ‘first objection’ against *The Spirit of the Laws*, summarized in Nugent's ‘Translator to the Reader’, art. cit.; and *Pensées*, No. 1908: ‘A thing is not just because it is law, but it must be law because it is just.’ Hobbes wrote the opposite (*On the Citizen*, Cambridge: Cambridge University Press, 1998, XII:1, p. 132). Montesquieu praises the great founders of modern natural law: ‘I extend my thanks to Messrs Grotius and Pufendorf for having accomplished what much of this work required of me, with that height of genius that I could never have attained’ (*Pensées*, No. 1863; cf. No. 1537).

<sup>20</sup> P. Martino, ‘De quelques résidus métaphysiques dans *L'Esprit des lois*’, *Revue d'histoire de la philosophie*, 1946, pp. 235-43.

when Montesquieu was extending the scientific concept of law (correlation between phenomena, relation between observable variables) from physics to moral theory.<sup>21</sup> Nevertheless, Montesquieu neither follows the ancient paths of natural law, nor joins modern attempts to reconcile sociability and self-love in the reciprocity imperative;<sup>22</sup> he rules out any overlap between natural and moral law.<sup>23</sup> The distinction is clear between relations of equity concerning man as an intelligent being and ‘laws of nature’ deriving from his animal or sensuous being; the laws uncovered in the state of nature – desire for peace, food, sexual and social partners – originate in the urge for self-preservation, prior to the development of reason. Although the instinctual laws of nature orient man towards peace and sociability rather than war, the state of nature, as in Hobbes, is an ethical void.<sup>24</sup> In the civil state, the natural laws by virtue of which certain civil laws can be declared iniquitous are limited to ‘natural defence’ and ‘natural modesty’; it is ‘felt’ tendencies, rather than normative, rational or ethical precepts, which continue natural human inclinations.<sup>25</sup>

Reflection on justice therefore involves the definition of equity that comes under the relations of ‘intelligent being’ with society, its creator and likeness. In the wake of Malebranche, Montesquieu affirms the univocality of law, which allows the physical and the ethical, relations of magnitude and relations of perfection, to be brought under the same concept.<sup>26</sup> The natural duties of man qua intelligent being now refer to *possible* relations among intelligent beings in a position of equality or subordination: the principle of political obligation (if there is a society, intelligent beings must obey its laws); the principle of gratitude (recognition for goods received); the principle of dependence (of the created on the creator); the *lex talionis* (punishment of an evil with the same evil) – a list that is not exhaustive. *The second and fourth of these laws, which cover the conditions of possibility of any society, therefore lead to a conception of justice as equality or proportion.*<sup>27</sup> But the laws of the moral world do not exert the same constraint as those of the physical world: ‘the intelligent world is far from being as well governed as the physical world.’<sup>28</sup> The *univocal* definition of law as a relation therefore rests upon a fundamental *equivocality*. In order to pass from Ought to Is, relations of equity have to be perceived by the understanding and followed by the will. Yet man is neither mere body nor pure intelligence: as a *sensuous* creature, susceptible to errors and passions, he tends to deviate from the laws that govern his nature. The first chapter of *The Spirit of the Laws* establishes both universal lawfulness and the principle that the degrees of necessity constantly vary with the probability that beings will follow the laws. For man qua moral being to follow

<sup>21</sup> L. Althusser, ‘Montesquieu: Politics and History’, in idem, *Montesquieu, Rousseau, Marx: Politics and History*, London: New Left Books, 1972, pp. 38-42.

<sup>22</sup> Hugo Grotius, *The Rights of War and Peace*, London: Walter Dunne, 1901, I, 1:10, pp. 21-22; Pufendorf, *Of the Law of Nature and Nations*, Oxford: L. Lichfield, 1703, I, 6:18.

<sup>23</sup> De Crevier remarked: ‘what is a work in which one seeks the principle of all laws and natural law is reduced almost to nothing’ (*Observations sur le livre De l’esprit des lois* (1764), quoted in *Montesquieu. Mémoire de la critique*, op. cit., pp. 415-16).

<sup>24</sup> SL, I:2. Equally clear is the opposition between ‘the law of nature, which makes everything tend towards the preservation of the species’ and ‘the law of natural enlightenment, which wants us to do to others what we would want to have done to us’ (SL, X:3).

<sup>25</sup> On natural defence and natural modesty as laws of nature, see SL, I:2, XV:2, XVI:12 and XXVI: 3-6. Natural law is not inviolable, however. There are cases ‘in which one can judge by the principles of civil right by modifying the principles of natural law’ (XXVI:5).

<sup>26</sup> In addition to Malebranche (see esp. *Méditations chrétiennes*, IV:8), Samuel Clarke again opposes Hobbes, by proposing an analogy between moral relations of justice and mathematical relations (*Discourse concerning the Obligations of Natural Religion*, esp. proposition III).

<sup>27</sup> Victor Goldschmidt, *Anthropologie et politique*, Paris: Vrin, 1983, p. 190; R. Aron, *Main Currents in Sociological Thought*, vol. 1, London: Penguin, 1968, pp. 56f.

<sup>28</sup> SL, I:1.

the laws of equity in the same way that man qua physical being follows the laws of bodies, he must be 'reminded' of them; the legislator must call on him to perform his duties, by means of political and civil laws.<sup>29</sup>

Both the opportunity and the risk of politics lie in this combination of law with the power to punish. Once the need for legal regulation is posited, moderation becomes a meaningful watchword in the face of despotism, so that the power established by human beings does not become too constrictive but respects the *just relations inherent in the nature of things*. But how should we understand the passage from possible relations of equity (which concern intelligent or moral beings) to equitable laws that fit actual societies and sensuous individuals? Montesquieu confers a crucial role on the legislator: the passage from essence to existence involves a *prudent* definition of the relation most in keeping with the circumstances. Political rationality must apply the possible relations to the real circumstances in which people live, and it is this application of the general to the particular that requires the art of politics based upon practical wisdom. Of course, this political rationality itself has a historical genesis. In already characterizing the 'enlightened age' in the preface as one of *prudent* reform, and in reconstituting the history of French law from a codification of customs and jurisprudence, *The Spirit of the Laws* excludes any 'constructivist' conception of law.<sup>30</sup> Far from the Platonic or Rousseauist myth of the semi-divine lawgiver who knows of passions and prejudices without feeling them himself, Montesquieu immerses politics in human ways of thinking and feeling. For rationality to come out in the drafting of laws, it is therefore not necessary that a philosophical intelligence should preside over the work of reform; the rationality of law is inseparable from the history of law, allowing for the possibility of a historical *cunning of reason*: 'Men, who are fundamentally reasonable, place even their prejudices under rules.'<sup>31</sup> No more than a king can the philosopher transcend the situation by his powers of reason and free will.<sup>32</sup> But although political rationality is silent, a 'reasonable' rather than 'geometrical' rationality<sup>33</sup> that demands no abstract philosophical reflexivity, prudence must keep in mind the gradual evolution of law vis-à-vis the customs that have been shaping nations since the earliest times.<sup>34</sup> Such is the face of reason in history: to grasp reason 'in the thing itself' (SL, XXIII:10) is to relate law both diachronically and synchronically to the totality of relations that are external to it.

In this complex conception of rationality, the possible law of equity and the actual relation of justice cannot be deduced from each other. The fourth rule shows this, since in moderate States the *lex talionis* is unjust. This principle of strict equivalence characterizes despotism, whose lack of prudence and disregard for difference makes it incapable of grasping the proportional relationship that should exist between the nature of crimes and the nature of penalties. In its simplicity, the *lex talionis* involves a conflation of the qualitative with the quantitative, which homogenizes where there needs to be differentiation (SL, VI:19). Despotism is precisely the regime that *reduces morals to physics*,

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<sup>29</sup> Religious laws take care of duties towards God; moral laws, of duties to oneself; and political laws, of duties to others that concern man as a social being (SL, I:1, near the end).

<sup>30</sup> See F. Hayek, *Law, Legislation and Liberty*, London: Routledge & Kegan Paul, 1979.

<sup>31</sup> SL, XXVIII:23. Montesquieu describes the unification of law in France to have been unjust, since justice has its own history: 'How can one apply a law if one does not know the country for which it was made and the circumstances under which it was made?' (*Pensées*, No. 1827). Hence the necessity to 'consider laws in their origin' (No. 1831).

<sup>32</sup> In the chapter 'On Legislators', which was originally meant to conclude the work, it is a question only of the prejudices and passions of political *philosophers* (SL, XXIX:19; see *Persian Letters*, No. 129).

<sup>33</sup> See Stéphane Rials's introduction to *La déclaration des droits de l'homme et du citoyen*, Paris: Hachette, 1988, p. 394. In this sense, Burke could draw on Montesquieu's authority for his critique of the French Revolution.

<sup>34</sup> According to Isaiah Berlin, there is a real tension in Montesquieu on this point: 'Montesquieu', in *Against the Current*, Princeton: Princeton University Press, 2001, pp. 130-61.

*the symbolic to the material, the qualitative to the quantitative.*<sup>35</sup> But when he studies penal justice in moderate States, Montesquieu has in mind a complex and sophisticated use of proportion, irreducible to arithmetical equivalence. The manuscript testifies to this: ‘The *lex talionis* can be abused like any other law, in such a way that a principle of equity clashes with equity itself.’<sup>36</sup>

So, how should one think of the application of the principles of equity, the integration of nature into history? Starting from a univocal definition of law, Montesquieu establishes correlations among the phenomena that involve *proportion* as a particular kind of ratio. As the titles of the various Books of *The Spirit of the Laws* indicate, the foundation of right becomes a question of the ratios in which laws *should* stand with the different ratios inherent in the nature of things: *the spirit of the laws is the ratio of ratios*. This conception brings into play the original definition of proportion as analogy. The concept of ‘ratio’ or ‘relation’ (*rapport*) that Montesquieu introduces in his opening definition of laws (‘necessary relations deriving from the nature of things’) is at the core of the mathematical, metaphysical and aesthetic definition of proportion in the *Encyclopédie*: not only is proportion there the ratio of ratios, but ratio itself is defined as proportion; reason (*logos* or *ratio*) determines what is in ratio (direct, indirect, or a mixture of both) in things. Thus, in mathematics, ‘just as one compares two magnitudes and a ratio is the result, so one may compare two ratios and a proportion is the result, when the ratios compared ... are equal.’ Proportion may be arithmetical or geometrical. In logic or metaphysics, Jaucourt defined the term as ‘relational conformity between things, when the mind, thinking of two objects, has conceived a ratio between them, or, thinking of two other things, also finds a ratio between them; this conformity of thoughts and relations is called *proportion*.’ In the aesthetic realm, proportion is defined as ‘a ratio, a fit within the whole and among its parts, in tasteful works.’ Conversely, ratio is defined in terms of proportion or fittingness (*convenance*): ‘in geometry and arithmetic, [this] is the result of the comparison of two quantities with each other in respect of their magnitude. One uses the word “ratio” [*raison*] even more commonly when it is joined to an adjective, as in *direct ratio, indirect ratio, double ratio*, etc.’

Several times in *The Spirit of the Laws*, Montesquieu evokes this definition of ratio as proportion to characterize the concomitant variations between physical magnitudes and quantities and/or moral magnitudes and qualities. In these examples, proportion features as the law of *what is the case* (‘In the various states of the East, the mores are purer as the enclosure of women is stricter’<sup>37</sup>) as well as the norm for *what should be the case* (‘There must be a proportion between the state as creditor and the state as debtor’;<sup>38</sup> ‘Natural equity demands that the degree of proof should be proportionate to the magnitude of the accusation’<sup>39</sup>). The moderate legislator makes the two agree with each other. To be rational and just in the allocation of good and ill (social advantages,<sup>40</sup> penal sanctions and military or fiscal burdens), political or civil laws must not break the relationship that exists between people and things in a given regime. The example of luxury is revealing. Although ‘luxury is *always* proportionate to the inequality of fortunes’ (VII:1), the art of politics should adapt laws to these relationship inherent in the nature

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<sup>35</sup> SL, V:18; VI:2. In the absence of a symbolic dimension, the only reward in despotism is money, and the only penalty is corporal punishment.

<sup>36</sup> Courtois, *Inflexions*, op. cit., pp. 110-20.

<sup>37</sup> SL, XVI:10; see also IV:2, V:15 and XXII:19; VI:9, XIV:10 and XVIII:10 (not an exhaustive list).

<sup>38</sup> SL, XXII:18.

<sup>39</sup> *Défense de L’Esprit des lois, Œuvres complètes de Montesquieu*, vol. 8, Paris: Éditions Classiques Garnier, 2010, p. 72. Cf. SL, XV:8.

<sup>40</sup> Among individuals in the state of nature and also among nations, war is a result of the fact that people ‘seek to turn in their favour the principal advantages of the society’ (SL, I:3). Laws are supposed to remedy this state of war.

of things. In monarchies, which dispense with sumptuary laws, ‘the rich *must* indeed spend in proportion to the inequality of fortunes, and, as we have said, luxury must increase in this proportion’ (VII:4). The law that suits this situation does not simply rely on prudence, bound up, as in Aristotle, with the indeterminacy of human affairs; it adapts itself to observable and sometimes measurable variations. The art of politics must be guided by knowledge of the *ratio* between population and subsistence resources: ‘Thus, in order to know if luxury must be encouraged or proscribed, one should first observe the relation between the number of people and the ease of giving them enough to eat.’<sup>41</sup> Although the correct ratios are not self-evident – they are felt or recognized in situation – the knowledge of ratios is at the basis of the rationalization of governance, beyond merely empirical prudence.<sup>42</sup>

A major difficulty remains: ratios are far from being always reducible to quantitative data; the only ones that are, in fact, are those which correlate physical magnitudes or moral magnitudes of an economic order.<sup>43</sup> The question, then, is whether relations of proportionality should be seen as part of the ancient tradition that defined justice in terms of geometric equality, or whether they should be associated with the project of establishing correlations among phenomena, which is the modern foundation of a social physics.<sup>44</sup>

## 2. Justice and equality: from Aristotle to Montesquieu

This question induces us to examine what becomes of the Aristotelian theory of justice in the political philosophy of Montesquieu. In *The Spirit of the Laws*, a critique of the worst regime replaces a definition of the best (the most just) regime.<sup>45</sup> The work puts forward an immanent theory of norms: moderation, the only real political good, is justified by the ‘infinite’ evils of its opposite, despotism. However, this reversal has a number of key consequences: *the relationship between justice and rationality becomes a question of the relationship between moderation and relations (above all, proportional relations) intended to preserve political and civil liberty*. Of course, the art of moderate politics must preserve a *correct measure* between the extremes of excess and lack: ‘I say it, and it seems to me that I have written this work only to prove it: the spirit of moderation should be that of the legislator; the political good, like the moral good, is always found *between two limits*.’<sup>46</sup> But the Aristotelian problematic of the political good – the just – is transposed to the modern world, so that the goal of any government is no longer to achieve the excellence peculiar to man, but to protect his rights in the face of violence from others and the risks of an

<sup>41</sup> SL, VII:6. Cf. IX:6 and XVI:4.

<sup>42</sup> See B. Binoche, *Introduction à De l'esprit des lois de Montesquieu*, Paris: P.U.F., 1998, p. 21.

<sup>43</sup> See especially SL, XVIII:10. Petty’s project for a political arithmetic was taken up in France by Melon: ‘Everything is reducible to calculation: this extends even to purely moral matters’ (*Essai politique sur le commerce*, in E. Daire, ed., *Economistes et financiers au XVIII<sup>e</sup> siècle*, Geneva: Slatkine Reprints, 1971, ch. 24, p. 809).

<sup>44</sup> See D. de Casabianca, *Montesquieu. De l'étude des sciences à l'esprit des lois*, Paris: Champion, 2008.

<sup>45</sup> B. Binoche (*Introduction à De l'esprit des lois de Montesquieu*) rightly speaks of Montesquieu’s ‘negative politics’. On his political philosophy as a flight from evil rather than a quest for good, see P. Manent, *La cité de l'homme*, Paris: Champs Flammarion, 1997, chs. 1-2 ; and S. Krause, ‘Despotism in the *Spirit of the Laws*’, in D. Carrithers, M. Mosher and P. Rahe, eds., *Montesquieu’s Science of Politics*, Oxford: Rowman & Littlefield, 2001, pp. 231-71. On despotic cruelty as a new figure of evil, see J. Shklar, *Ordinary Vices*, chs. 1, 3, 5.

<sup>46</sup> SL, XXIX:1. In politics, the best is the enemy of the good: ‘Extreme laws for good give rise to extreme evil’ (XXII:21). An anthropological principle lies at the basis of this political watchword: ‘men almost always accommodate themselves better to middles than to extremities’ (XI:6). In his inflection of Aristotelianism, Montesquieu thus evokes Pascal’s dread at the disproportion of man between two infinities – man, the ‘middle between nothing and everything’, is incapable of judgement (*Pensées*, Br. 72).

abuse of power.<sup>47</sup> Montesquieu insists on the plurality of goods in politics (XXVI:2), that is, on the plurality of possible forms of moderation associated with the suitability of the laws to the mores; that which suits a people will not need to be imposed on it by violence, whether real or symbolic.

This move away from the classical problematic may be gauged by the new focus on the power to punish, on which the freedom of the citizen ‘principally’ depends (XII:2). In contrast to the cruelty of despotism, which gives expression to arbitrary excess and destroys the relations among things, moderate power keeps the coercion or violence necessary for obedience to a minimum. An iniquitous severity of punishment expresses a lack of reason, that is, of prudence.<sup>48</sup> But in order to avoid corruption and a slide into despotism, it is necessary to limit *all* the powers of the state that are susceptible to abuse (political, civil, military and fiscal power). For the concept of moderation to be operational, the extremes of variation must be known, as well as the correct middle that defines the political good in the given situation.<sup>49</sup> Here the distance from political Aristotelianism becomes clear: the *correct measure* is now defined in terms of the rational ratios among the phenomena inherent in the nature of things, which must be respected if the abuse of power is to be avoided. Montesquieu’s definition of justice as *moderation*, and of the virtue of justice as its *spirit of moderation*, is therefore not sufficient to make him a mere continuator of Aristotle. The theory of prudence is now combined with a philosophy of judgement. The spirit of moderation is defined by the ability to identify the ratio that exists among things: it must be faithful to the ‘correct proportion’ and the ‘correct value of things’.<sup>50</sup> Hence the legislator not only examines the range of variation within which laws might achieve the desired effects, but also respects the correct proportions needed to produce a twofold security (preservation of the state, liberty of subjects).

Paradoxically, Montesquieu’s opening definition of laws (‘necessary relations deriving from the nature of things’) thus leads to a normative politics: *justice appears linked to a certain image of necessity, not to the self-glory of princes*. A just war is proportional to the real dangers of the situation, not to ‘arbitrary principles of glory, of propriety, of utility’ (X:2); a just punishment is proportional to the real evil done against society, not to an imaginary evil such as an offence to princely or divine glory (XII:4); and a just tax is proportional to the real needs of the state, not to its imaginary needs or self-glory (XIII:1). In each case the proportional justice, accorded to necessity and based on reciprocity, is derived ‘from reason’, that is, ‘from the nature of the thing’ (XII:4);<sup>51</sup> to go beyond that necessity is to sink into arbitrariness and caprice, the despotic figure of injustice ‘against nature’. The watchword of *The Spirit of the Laws* makes its appearance here. In the human legislator as before in the divine lawgiver (I:1), wisdom must illuminate power: in modern (non-

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<sup>47</sup> Thomas Pangle mainly stresses security in relation to one’s fellow citizens, thereby making Montesquieu a masked disciple of Hobbes (*Montesquieu’s Philosophy of Liberalism*, Chicago: The Chicago University Press, 1977, esp. p. 55). B. Manin shows that Montesquieu is even more afraid of the insecurity stemming from political power (‘Montesquieu et la politique moderne’, in *Cahiers de Philosophie politique*, Reims, Nos. 2-3, OUSIA, 1985, pp. 197-229).

<sup>48</sup> ‘It is a misfortune in government when the magistracy sees itself thus constrained to make cruel laws. Because obedience has been made difficult, one is obliged to augment the penalty for disobedience or to make faithfulness suspect. A prudent legislator avoids the misfortune of becoming a terrifying legislator.’ (SL, XV:16).

<sup>49</sup> SL, XXIX:1. See the analysis in Binoche, *Introduction*, pp. 245-86.

<sup>50</sup> See Montesquieu, ‘An Essay on the Causes That May Affect Men’s Minds and Characters’, translated in *Political Theory*, Vol. 4, No. 2 (May 1976), pp. 139-62.

<sup>51</sup> See SL, XII:4: the death penalty is ‘derived from the nature of the thing and is drawn from reason and from the sources of good and evil’; and, with regard to the classification of crimes and punishments, ‘all that I say is drawn from nature and is quite favourable to the citizen’s liberty’. Cf. XIII:8: ‘the natural penalty, the one that reason demands...’

despotic) states, ‘the law is not a pure act of power’ (XIX:14). For Montesquieu, the theory of justice is inseparable from a theory of rationality. If the law is not to be a ‘pure act of power’ that makes subjects feel their servitude, it must avoid arbitrariness or abuses. The law cannot be defined only by the will of the sovereign; the light of reason must apply the relations inherent in the nature of things.

### 3. The just price of the law

It remains to spell out how justice is rationalized in terms of optimum security. I shall argue that, on several occasions, *Montesquieu thinks of the rationalization of justice as the determination of a just price*. Just trade, which presupposes the equality of citizens,<sup>52</sup> fixes the fair price of goods according to the needs and interests of men and nations; whereas penal justice and fiscal justice, which involve exchanges between the citizen and the State, fix the just price that citizens pay the State for their security. In each case, Montesquieu considers the implications of despotic corruption for politics, inflecting Aristotle’s theory of justice in light of the modern problematic of power.

The analysis of justice in trade displays both continuity and discontinuity with Aristotle. For the ancient thinker, justice in voluntary transactions involves reciprocity based on a prior adjustment that homogenizes the goods and makes them commensurate with each other; the benefits have to be equivalent in both quantity and quality.<sup>53</sup> In *The Spirit of the Laws*, however, competition replaces the setting of a ‘just price’ by the public authorities or by common agreement: ‘It is competition that puts a *just price* on goods and establishes the *true relations* between them’ (SL, XX:9). Not only is the value of goods fixed by supply and demand in accordance with the needs of the trading partners who negotiate a price;<sup>54</sup> the value of the currency itself, a commodity *and* a token serving as a common measure, depends on the relationship between supply and demand.<sup>55</sup> To the ‘positive value’ of cash fixed by the prince is added a ‘relative value’ that reflects the ‘estimation’ of the parties to the exchange (XXII:10). In market societies, *evaluation* of the currency thus proceeds by way of *comparison*, both in the relationship with commodities that the standard of measurement represents and in the relationship with other currencies that is established on a daily basis in exchange operations. This is the reason why arbitrary devaluation fails in the modern world: ‘Exchange has taught the banker to compare all the monies of the world and set them at their just value; the grade of monies can no longer be kept secret’ (XXII:13). According to Montesquieu, this just value is inherent in the ‘nature of things’; it signals the adjustment of the proportional ratios, in accordance with the time and the place.<sup>56</sup> Despotic injustice (arbitrariness, violence) occurs when failure to adjust those ratios begets a lack of confidence and a sense of insecurity; whereas justice is associated with respect for those ratios, which generates confidence (the wellspring of the economy) and a secure sense of property.<sup>57</sup> In monetary and other matters, the discretionary use of power leads to princely impotence and mass poverty: ‘Thus the prince or magistrate can no more assess the value of

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<sup>52</sup> SL, V:8; XX:19-22.

<sup>53</sup> Aristotle, *Ethics*, translated by J. A. K. Thompson, London: Penguin, 1955, V:5, pp. 151f.

<sup>54</sup> SL, XX:2. Cf. XXII:1; XXII:8.

<sup>55</sup> Inflation due to the inflow of American silver is explained in terms of a disproportion between currency supply and demand: ‘A great quantity of silver was suddenly brought to Europe; soon fewer people needed silver; the price of everything increased and that of silver diminished; the proportion was, therefore, disrupted’ (SL, XXII:6).

<sup>56</sup> ‘The exchange everywhere always tends to bring itself into a certain proportion, and this is in the very nature of the thing itself’ (SL, XXII:10); cf. XXII:12: ‘but one had done only what the nature of the thing required and has re-established the proportion between the metals that served as money.’

<sup>57</sup> See, for example, SL, V:14-15; XII:23.

commodities than he can establish by an ordinance that the relation of one to ten is equal to that of one to twenty. Julian caused a horrible famine when he lowered the price of produce at Antioch.<sup>58</sup>

Taxes, as a form of exchange, have a similar dynamic: ‘The revenues of the state are a portion each citizen gives of his goods in order to have the security or the comfortable enjoyment of the rest’ (XIII:1). As in the case of war,<sup>59</sup> justice is linked to necessity – an element of both continuity and discontinuity with the scholastic tradition. Against the Machiavellian logic of *raison d’État*, the moderate politician must here determine the *just price of security*, which balances the competing claims of protection for his subjects and preservation or power of the state. Did Richelieu, the symbol of absolutism, consider that the justness of a tax depended on a ‘geometric proportion’ between state subsidies and the necessities of the state? In those days, ‘necessities’ included everything required for the kingdom to maintain itself ‘in its grandeur and glory’.<sup>60</sup> But Montesquieu rejected that logic of self-glory: the alliance of wisdom (which seeks to expand power) and prudence (which limits that power) is constitutive of moderation, as it was earlier in his arguments against a policy of conquest.<sup>61</sup> Politics is centrally a question of optimum calculation: ‘There is nothing that wisdom and prudence should regulate more than the portion taken away from subjects and the portion left to them’ (XIII:1). But, beyond correct quantification, moderate taxation rests qualitatively on policies that attend to the sense of security. While taxes on goods must be proportionate to their value if people are not to feel a sense of servitude,<sup>62</sup> personal taxation must be proportionate to needs (rather than goods): ‘In respect to an impost on persons, an unjust proportion would be one that followed strictly the proportion of goods. ... [In Athens] the assessment was just although it was not proportional; if it did not follow the proportion of goods, it followed the proportion of needs.’<sup>63</sup> Such is the justice or rationality of taxation: what the people give in exchange for its security should not undermine the opinion that it has of its security. The exchange is based on a calculation in the minds of men, in which liberty may be conceived as ‘compensation’ for the property taken in taxation. The moderate politician must therefore respect the proportionality between taxation and liberty in order to avoid revolts (XIII:12). In the taxation of goods, any disproportion between the size of the a mark of servitude:

In order to make the price of a thing and its duty become confused in the head of the one who pays, there must be some relation between the commodity and the impost, and one must not charge excessive duty on a product of small value. There are countries where the duty is

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<sup>58</sup> SL, XXII:7. Cf. XXI:20.

<sup>59</sup> Only self-defence justifies the use of violence: ‘[A] state wages war because its preservation is just, as is any other preservation. ... Therefore, the right of war derives from necessity and from a strict justice. If those who direct the conscience or the councils of princes do not hold to these, all is lost; and, when that right is based on arbitrary principles of glory, of propriety, of utility, tides of blood will inundate the earth’ (SL, X:2). Compare Cicero, *De Officiis*, I:12, §38.

<sup>60</sup> Richelieu, *Testament politique* (1688), Caen: Centre de philosophie politique et juridique, 1985, p. 383. ‘As I have already remarked, there must be proportion between what the prince draws from his subjects and what they are able to give him, not only without ruining themselves but without suffering major trouble’ (pp. 375-76).

<sup>61</sup> The monarchy must respect a just measure for its territory: ‘Just as monarchs should be wise in increasing their power, they should be no less prudent in limiting it. While they put an end to the drawbacks of being small, they must always have an eye out for the drawbacks of being large’ (SL, IX:6).

<sup>62</sup> The prince must avoid excessive taxation of goods that would be confiscated in case of fraud, since that would ‘remove all proportion in penalties’ and people would feel a sense of their servitude (SL, XIII:8).

<sup>63</sup> SL, XIII:7. In some cases taxation should take from each according to his needs; in others it should take from each according to his wealth or power. See SL, IX:3: ‘The towns of Lycia paid the costs in proportion to their votes. The provinces of Holland cannot follow this proportion; they must follow that of their power.’

more than seventeen times greater than the value of the commodity. In this way the prince removes the illusion from his subjects; they see that they are led in an unreasonable manner, and this makes them feel every bit of their servitude (XIII:8).

If just politics (in accordance with *nature*) favours the interests of both rulers and ruled, this is because it sets the *just price* on the security it provides.

Analysis of penal justice confirms this conception of the measure of right. The principle of necessity governs the analysis of justice based on qualitative and quantitative knowledge of the relations among things, which is the foundation of liberty.<sup>64</sup> Defined as the opinion people have about how secure they are, liberty is proportional to the number (quantity) and modalities (quality) of the judicial procedures that afford protection for individual rights and, in particular, for the innocent.<sup>65</sup> In moderate states, the just measure is thought of as lying between the limits of ‘too much’ and ‘too little’ – competing imperatives that correspond to the two essential goals of the law (protection of property and protection of liberty):

If you examine the formalities of justice in relation to the difficulties a citizen endures to have his goods returned to him or to obtain satisfaction for some insult, you will doubtless find the formalities too many; if you consider them in their relation to the liberty and security of the citizens, you will often find them too few, and you will see that the penalties, expenses, delays, and even the dangers of justice are the price each citizen pays for his liberty (VI:2).

In justice as in taxation, then, the task is to set *the just price for security* of persons and goods and, in each case, to find the optimum level for the competing constraints (security of citizens *vis-à-vis* other citizens *and* the state). According to Montesquieu, the preservation of liberty presupposes first of all a graduated scale in accordance with the nature of things, which establishes a conceptual homogeneity between the nature of the penalties and the nature of the crimes;<sup>66</sup> the legislator must classify the differences in a hierarchy. But moderation also requires a quantitative proportion between crimes and penalties,<sup>67</sup> which draws on a range of physical, monetary and symbolic sanctions. Here too, the social utility of the penalty – its necessity – is its only justification. Anything beyond that is arbitrary and provokes a sense of servitude: ‘Every penalty that does not derive from necessity is tyrannical.’<sup>68</sup> If the crime injures society, and no longer the Sovereign or the

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<sup>64</sup> ‘The knowledge already acquired in some countries and yet to be acquired in others, concerning the surest rules one can observe in criminal judgements, is of more concern to mankind than anything else in the world. Liberty can be founded only on the practice of this knowledge’ (SL, 2). Cf. VI:2: ‘It is constantly said that justice should be rendered everywhere as it is in Turkey. Can it be that the most ignorant of all peoples has seen clearly the one thing in the world that it is most important for men to know?’

<sup>65</sup> ‘One can see that there must be at least as many formalities in republics as in monarchies. In both governments, formalities increase in proportion to the importance given to the honour, fortune, life and liberty of the citizens’ (SL, VI:2).

<sup>66</sup> ‘It is the triumph of liberty when criminal laws draw each penalty from the particular nature of the crime. All arbitrariness ends; the penalty does not ensue from the legislator’s capriciousness but from the nature of the thing, and man does not do violence to man’ (SL, XII:4). In this regard, Montesquieu combines a retributionist and a utilitarian point of view: see D. W. Carrithers, ‘Montesquieu’s Philosophy of Punishment’, *History of Political Thought*, 19/2, 1998, pp. 213-40.

<sup>67</sup> Montesquieu devotes two chapters to this scale: ‘On the just proportion between the penalties and the crime’ (SL, VI:16) and ‘That liberty is favoured by the nature of penalties, and by their proportion’ (XII:4). The proportion may sometimes be quantifiable, when money plays the role of equivalent: ‘Cannot pecuniary penalties be proportionate to fortunes?’ (VI:18). This is not the case, however, with symbolic penalties (infamy).

<sup>68</sup> SL, XIX:14. It is well known that Beccaria attached great importance to the spread of this principle in Europe (see his *Essay on Crimes and Punishments*, 1764).

Divinity, justice will not be repairing an imaginary (potentially infinite) wrong with an inordinate penalty;<sup>69</sup> it can react in a proportionate manner to the evils occasioned.

There remains the question of how to measure damage and reparation – the classical question of evaluation and commensurability. Which standard can determine the extent of the crimes and punishments, comparing, classifying, grading or even quantifying them? Which scales are adequate here? The originality of Montesquieu's thesis needs to be underlined: *the measure of justice does not depend only on the typology of constitutions but also on the general spirit of peoples*. Some 'barbarian' peoples claimed to administer the most precise justice by projecting moral magnitudes onto physical magnitudes.

Our fathers, the ancient Germans, lived in a climate where the passions were calm. Their laws found in things only what they saw, and they imagined nothing more. And just as these laws judged insults to men by the size of the wounds, they put no greater refinement in the offences to women. The Law of the Alemanni on this point is quite singular. If one exposes a woman's head, one will pay a fine of six sous; it is the same for exposing a leg up to the knee; double above the knee. *The law, it seems, measured the size of the outrages done a woman's person as one measures a geometric figure*; the law did not punish the crime of the imagination, it punished that of the eye.<sup>70</sup>

The legislator is not an empire within an empire; the spirit of the laws depends on the general spirit of a people; the institutions are dependent on the social relations, the forms of domination and the material conditions of human existence.<sup>71</sup> Here the link appears between the history of law and the philosophy of law: the rationality of the laws is circumstantial;<sup>72</sup> the measure of justice varies with the *spirit* of the nations, which is defined in nominalist fashion as their disposition of mind. Putting an end to the state of nature, the 'settlements' practised by barbarian peoples set the *just price* able to repair the wrongdoing, to restore equilibrium and civil peace.

One can see that the wise men of the various barbarian nations thought they themselves should do what was too slow and too dangerous to be expected from a reciprocal agreement of both parties. *They were heedful to put a just price on the settlement* that was to be accepted by the one who had been injured or wronged. All these barbarian laws have an *admirable precision* on the subject; *cases are carefully distinguished, circumstances are weighed*; the law puts itself in the place of the offended man and asks for him the satisfaction that, in a cool moment, he himself would have demanded.<sup>73</sup>

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<sup>69</sup> M. Foucault, *Discipline and Punish*, London: Penguin, 1977, p. 50. See C. Larrère, 'Droit de punir et qualification des crimes de Montesquieu à Beccaria', in M. Porret, ed., *Beccaria et la culture juridique des Lumières*, Geneva: Droz, 1997, pp. 89-108.

<sup>70</sup> SL, XIV:14; emphases added. As Northern peoples, the ancient Germans are devoid of imagination (XIV:2).

<sup>71</sup> SL, XIV:10; XVIII:1-16. On Montesquieu's relationship to the Marxist theory of law, see R. L. Meek, *Social Science and the Ignoble Savage*, Cambridge: Cambridge University Press, 1976, pp. 31-35.

<sup>72</sup> Montesquieu judges the extent to which the spirit of the customs or laws conforms to the spirit of a people: 'Therefore, I say that in the circumstances of the times when proof by combat and proof by hot iron and boiling water were the usages, there was such an agreement between these laws and the mores that the laws less produced injustice than they were unjust, that the effects were more innocent than the causes, that they more ran counter to fairness than they violated rights, that they were more unreasonable than tyrannical' (SL, XXVIII:17). See also XXIX:14: 'That laws must not be separated from the circumstances in which they were made.'

<sup>73</sup> SL, XXX:19; emphases added. It is not insignificant that this is a ranked justice, complex and qualitative in so far as it took the quality of persons into account: 'Differences of conditions made for differences in settlements; ... the size of the settlement established on the head of a man was one of his great prerogatives for, besides distinguishing his person, it established a greater security for him among the violent nations' (ibid.).

Before Nietzsche,<sup>74</sup> Montesquieu dwelled on the social role of the measuring of prices or values, the invention of equivalences. Genealogy reveals exchange at the origins of justice. In pastoral societies, justice can be precise because the value of persons is measured in the same way as the value of animals or things.

All these settlements were fixed for a price in silver. But as these peoples, especially while they stayed in Germany, had scarcely any silver, they could give livestock, grain, furniture, weapons, dogs, hunting birds, lands, and so forth. *The law often even fixed the value of these things*, which explains how, with so little silver, they had so many pecuniary penalties. Therefore, these laws sought to mark precisely the differences in wrongs, injuries and crimes, in order for each man to know exactly to what degree he had been wounded or offended, in order for him to know *exactly* the reparation he should accept and above all for him to know he should accept no more.<sup>75</sup>

Beyond reparation, the principle of proportional compensation is similarly found in the sanctioning of disturbances to the civil peace and security. Before the existence of the state, the security of individuals depended on the justice of the powerful; this explains the price (*fredum*), over and above any compensation, which the guilty party had to pay the lord for his protection: 'the size of the *fredum* was proportional to the size of the protection' (XXX:20). At the origin of penal law, then, is the principle of a real exchange between wrong and reparation, between price paid and service rendered. In making the penalty proportional to the crime, the moderate legislator, in keeping with the general spirit of the people, works out a justice that he has not created.

A comparison with Durkheim, who considered Montesquieu a precursor of sociology, is revealing on this point. Subordinating the art of politics to political science, the sociologist tries to preserve the social science of value judgements – the ideal of justice that was at the heart of 'classical' political philosophy. To the question of whether social disapproval (punishment) for an offence to collective feelings (the crime) is just or rational, he answers with a flat denial: 'But we need not launch into such discussions, for we are seeking to determine what is or has been, not what should be.'<sup>76</sup> Measuring values by the yardstick of facts, reducing justice to law and the law to an expression of mores, *The Division of Labour in Society* explores the precautions taken to make the sanctions 'as proportional as possible' to the crime.<sup>77</sup> The sanction depends directly on the intensity of the collective reaction, and so Durkheim can dispense with the legislator's role: 'Since the gravity of the criminal act varies according to the same factors, the proportionality everywhere observed between crime and punishment is therefore established with a kind of mechanical spontaneity, without any necessity to make elaborate computations in order to calculate it.'<sup>78</sup> Montesquieu never went as far as that: although he helped to demystify the figure of the legislator, he did not make existing mores the efficient cause

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<sup>74</sup> See Nietzsche, *On the Genealogy of Morality*, Cambridge: Cambridge University Press, 2006, First Essay, §8, p. 46: 'Every thing has its price: *everything* can be compensated for.' Nietzsche mentions barbarian settlements in particular.

<sup>75</sup> SL, XXX:19; cf. XXII:2. Montesquieu mentions elsewhere the evaluation of men in primitive (barbarian) times: 'In those times, men were regarded as lands' (XXI:20). In non-warrior market societies, the situation is reversed: the justness of social relations is subordinate to the logic of exchange. The spirit of *exact justice* then finds expression in strict reciprocity – every service must be 'compensated', 'each according to his share' (XX:2).

<sup>76</sup> Émile Durkheim, *The Division of Labor in Society*, Boston: Free Press, 1997, p. 34.

<sup>77</sup> 'This demonstrates that we have remained true to the principle of talion, although we conceive of it in a more lofty sense than once we did. We no longer measure in so material and rough terms either the gravity of the fault or the degree of punishment.' *Ibid.*, p. 47.

<sup>78</sup> *Ibid.*, p. 57.

of laws.<sup>79</sup> In outlining a set of norms that cannot be exhaustively reduced to a science of laws, he remained an advisor to the prince, a purveyor of rules and maxims. Thus, the supreme political evil inflicted by the state (the death penalty) is justified as the rational sanction for an act that attacks the political good *par excellence*: liberty understood as the security of persons and property. In a normative perspective, death is the just price for an attack on the state's principal justification and the essential function of the law: it is a 'kind of retaliation, which causes the society to refuse to give security to a citizen who has deprived or has wanted to deprive another of it.'<sup>80</sup>

In the final analysis, then, the whole theory of justice may be thought of as a theory of the *just price* set in exchange. The difficulty of interpretation does not lie here in possible tensions between an objectivist conception of justice grounded on the nature of things (in continuity with Aristotle or Aquinas) and the modern route of subjective rights. For Montesquieu, the conquering peoples of the North brought liberty and the message of modern contractualism when they founded the European monarchies.<sup>81</sup> The civilized state, he argues, aims at the protection of the person and property: 'As men have renounced their natural independence to live under political laws, so have they renounced the natural community of goods to live under civil laws. The former laws acquire liberty for them; the latter, property.'<sup>82</sup> Failing a real theory of contract, *The Spirit of the Laws* illuminates the nature of the *exchange* that is at the origin of the state; it theorizes the *social utility* of government in terms of the protection of rights.<sup>83</sup> But these rights are themselves defined by usage, in accordance with the 'spirit' and mores of the people. Property and liberty are both *values* (the ends of the civilized state) and *variables* (varying with the state of society, the physical and moral nature of things). This is truly a theoretical *coup de force*, which makes it possible to unify the theory of justice in *The Spirit of the Laws* and reveals its normative scope: the measure of right depends on an evaluation of persons and things that is bound up with the 'general spirit'. Although 'everything has two kinds of value: intrinsic value, and a value in opinion',<sup>84</sup> the value of persons and things is determined not by nature but by convention, in accordance with the political regime and the historical form of the relations of domination. The just price of rights is assessed in situation: a particular conception of justice corresponds to each form of practical rationality.<sup>85</sup> No right is inviolable, not even liberty; no right is absolute, since all have been defined empirically in accordance with a people's nature; everything can be valued, according to circumstances, at its *just price*. Ultimately this is what makes it possible to rationalize justice, in keeping with the utility of command for princes and the utility of obedience for men.

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<sup>79</sup> Durkheim, 'Montesquieu's Contribution to the Formation of Social Science', in idem, *Montesquieu and Rousseau: Forerunners of Sociology*, Ann Arbor: University of Michigan Press, 1960, ch. 4.

<sup>80</sup> SL, XII:4.

<sup>81</sup> 'The Goth Jordanes called northern Europe the manufactory of the human species. I shall rather call it the manufactory of the instruments that break the chains forged in the south. It is there that are formed the valiant nations who go out of their own countries to destroy tyrants and slaves and to teach men that, as nature has made them equal, reason can make them dependent only for the sake of their happiness.' SL, XVII:5.

<sup>82</sup> SL, XXVI:15, translation modified. This point becomes problematic once the republic presupposes agrarian legislation, sumptuary laws and inheritance laws: that is, the subordination of civil law to political law, and private goods to the public good. But property is safe once it is defined as political – even safer than in monarchies (SL, XX:4).

<sup>83</sup> This is why there are unjust laws that testify to the violence of the state, which, though explicable, are not excusable. Thus, 'an Athenian law stated that all unnecessary persons should be put to death in the event that the city was besieged' (SL, XXIX:14, translation modified).

<sup>84</sup> Montesquieu, 'An Essay on the Causes That May Affect Men's Minds and Characters', op. cit., p. 151.

<sup>85</sup> See Alasdair MacIntyre, *Whose Justice? Which Rationality?*, London: Duckworth, 1988.

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Montesquieu therefore adopts a historicist approach, abandoning the 'transcendent' values and completeness of a 'cosmos' that grounds the political order on a natural order of justice. But this does not mean that he gives up all idea of rooting justice in an objective order, in 'the nature of things'. The relations of proportionality that shape up differently in each state and society are objective relations that the art of politics must embrace. The stakes are important: Straussian theory, as much as its contemporary critics, must take into account the special place of *The Spirit of the Laws* within political modernity. In Montesquieu, the critique of positivism does not lead back to the classical conception of natural law, nor does it imply a wish to impose a universalist politics of human rights; juridical relativism does not lead to nihilism (all values are equal), nor does it entail restoring the transcendence of a natural or ideal order or a transcendent subjectivity. Juridical normativity remains written into the nature of things, but *this nature of things is itself historical*. The philosophy of law is inseparable from the history of law, the court of reason from the court of history. The status of political rationality is thereby redefined: the aim of setting the 'just price' on values and things is not the product of a 'Promethean' voluntarism; it takes the ancient aspiration to ground justice on equality and redefines it in terms of a modern conception of the relationship between power and liberty.